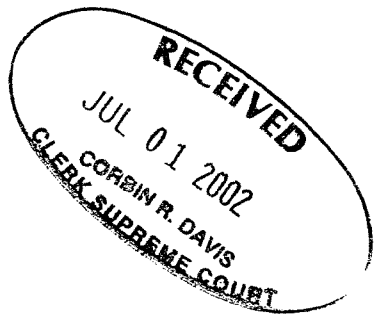
MPA
Michigan Psychological Association

June 27, 2002

Mr. Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909



Re: 1999-10
Proposed Amendments of
Rules 703 and 1101 of the
Michigan Rules of Evidence

Dear Mr. Davis:

On behalf of the Michigan Psychological Association and the Michigan Society of Forensic Psychologists jointly, we welcome the opportunity to comment on the latest proposed amendments concerning MRE 703 and MRE 1101.

Pertinent History

On November 30, 2000 and July 27, 2001, we joined with other professional organizations and individuals in offering written commentary concerning the original proposal by the Advisory Committee and in reply to Judge Giovan's written critique of our testimony at the public hearing. Since Alternative A of the proposals concerning MRE 703 is simply a recycling of the original recommendation by the Advisory Committee, our prior comments presumably retain the same force and relevance as they did at that time. Rather than simply restate the same detailed arguments, we request that our earlier submissions be incorporated by reference in our present statement. For the convenience of the justices, we have reproduced them as attachments to the present commentary.

2105 University Park Drive, Suite C-1, Okemos, Michigan 48864, (517) 347-1885.*fax* (517) 347-1896

Objections to Alternative A

Very briefly, the principal difficulty with Alternative A is that it ignores the fact that *investigative experts* (e.g., those experts who conduct independent child custody evaluations in family court and child protection investigations in probate court, independent medical or psychological examinations in personal injury and employment litigation, and independent psychiatric examiners under Section 20a of MCL 768) necessarily conduct their own discovery and unearth much of the relevant evidence themselves. The use of such investigative experts is clearly contemplated in MRE 703, which states that experts are entitled to base their opinions on facts or data "perceived by or made known to the expert...before the hearing." Since these facts and data typically involve unsworn, out-of-court statements from the parties and various collateral sources, some reliance on hearsay is inevitable in forming these experts' opinions.

To the extent that these experts conduct truly independent evaluations following their own recognized professional standards (rather than waiting to be spoon-fed the "facts" by attorneys for one of the parties), they will have no means of anticipating, much less determining, which facts, statements, records, and observations will otherwise be presented to the court or admitted into evidence. Inevitably, there will be sufficient discrepancies between the bases for such experts' opinions and the evidence as formally submitted to the court to provide grounds for a challenge concerning the evidentiary status of the bases of the experts' opinions.

Because Alternative A completely eliminates the court's discretion over whether such discrepancies are so significant and essential to an expert's opinion as to render the entire opinion inadmissible, it can be anticipated that skilled attorneys could, in virtually every case, exploit minor inconsistencies, however superficial, as a potent means of preventing the testimony of unfriendly experts from ever seeing the light of day.

Objections to Alternative B

Alternative B purports to address this problem by permitting the expert (under subrule (b)) to base an opinion in part on hearsay, provided that there is no good-faith basis for contesting the truth or accuracy of the hearsay. Rather than repair the glaring problems of Alternative A, this version merely places a fig leaf over them.

How often should we expect that the conditions stated under subrule (b) to exist in the everyday world of trial practice? That is, how often will there be no good faith disagreement between the parties about what one of the parties or some third person told the expert? Further, how difficult will it be for any competent attorney to make at least a reasonable showing at a pre-trial motion that the court should

anticipate that some piece of evidence will be proffered that has some good-faith potential to raise doubt concerning the accuracy of what the expert says he was told?

Litigation in which there is no bona fide disagreement over a host of factual matters is rare. The most casual inspection of a random sample of briefs submitted to the Michigan Supreme Court (where, of course, the overriding concern is with matters of law) will establish that wide disparities between the parties' statements of fact are not the exception, but the rule. How much wider a gulf between the parties' positions on the facts should one expect to find presented in the lower court, whose first order of business is establishing the facts? Given the high strategic value of preventing unfriendly experts from even appearing on the stand, attorneys can be expected to leave no stone unturned in their efforts to find some piece of evidence, however trivial, to cast doubt on some piece of hearsay in opposing experts' opinions, and thus eliminate their testimony entirely.

If we are correct in supposing that few attorneys will succeed in persuading the court that no future piece of evidence introduced by the other side could ever succeed in raising some scintilla of doubt about some bit of hearsay considered by their expert, then, in substance, Alternative B is no alternative at all. It merely collapses into Alternative A and shares all of the latter's defects.

As for the real world impact of adopting subrule (b), the Staff Comment is apposite:

> Whenever possible, decisions about whether an opinion will be admitted pursuant to subrule (b) of Alternative B should be made in pretrial rulings. The court may require the parties to file motions, responses, and supporting affidavits in which the proponent discloses the factual basis for an opinion and the opponent states any challenges to the truth of that factual basis.

All of these motions, responses, affidavits, and pretrial rulings are going to mean a substantial increase in the cost of litigation for the parties and a substantial decrease in the speed with which courts can pare down their dockets. As Judge Giovan has noted: "If the truth be told, trial judges *dislike* preliminary hearings about the admissibility of evidence and with good reason. It brings everything to a halt." Further, each additional pretrial ruling a judge has to make is one more opportunity for an appeal by the losing party.

Given the huge uncertainty about the admissibility of any given investigative expert's opinions under Alternative B, attorneys will have to calculate carefully whether the use of any such expert will be worth the trouble and expense. Now, while some jurists may wish to say good riddance to experts in order to return to some halcyon day when cases were ostensibly decided purely on the "facts," three considerations militate against the conclusion that raising a high bar against

investigative experts would serve the legal process well:

a) As U.S. Supreme Court recognized in *Daubert* and *Joiner*, much of modern litigation involves the interpretation of scientific, technical, and other specialized types of information that requires assistance from experts in order to determine the weight and applicability of the evidence presented. In cases where it cannot easily be determined in advance of the expert's own investigation what relevant evidence will be important to the expert's opinion, both Alternatives A and B will prevent experts from having anything useful to say.

b) Experts often reduce the length and cost of trials by organizing and synthesizing a wide range of information in a way that is intelligible to and usable by the finder of fact. Without this kind of assistance, judges and jurors will have to sit through extensive presentations by many more witnesses of all of the underlying factual evidence and will be left to their own devices to infer from the facts to their technical as well as legal significance.

c) The availability of strong and persuasive expert opinions is one of the key factors making alternative dispute resolution possible. While the parties may never be able to agree on all of the facts, they can often effectively determine the value of their cases by assessing the strength of their experts. This is particularly true in family law, where the norm is for the parties to use a single impartial expert, appointed under MRE 706 by stipulation or by the court. Such experts opinions will have very little value in settling cases if small discrepancies in how the evidence goes in can eliminate their participation—when, so to speak, a pebble can easily topple a giant.

In short, Alternative B is in substance virtually indistinguishable from Alternative A. Few, if any, experts will be permitted to testify under Alternative B who would have been excluded under Alternative A. Moreover, Alternative B is even worse than Alternative A from a procedural standpoint. Whereas under Alternative A, a court might decide to wait to hear the relevant evidence at trial before ruling on whether to permit an expert to testify, under Alternative B, it would almost always be required to hear motions and conduct pre-trial hearings in advance of trial. Thus, we must join with Judge Giovan in finding that Alternative B is "a bad idea."

Objections to proposed changes in MRE 1101

The accompanying proposal for "exemptions" in MRE 1101 illustrates how far one must go in complicating and distorting other areas of law and procedure in order to accomplish the proposed "reform" of MRE 703. It turns out that altering the

language in Rule 703 is like tugging at a loose thread in a woven garment—more and more of the garment itself begins to bunch and unravel.

Their intended purpose notwithstanding, it is hardly the case that the proposed changes in MRE 1101 address any of the legitimate concerns we and many other organizations have raised regarding the proposed changes in MRE 703. Not only are they grossly unworkable, but they also vitiate the very objective behind the proposals to change Rule 703.

In brief, the changes are unworkable because:

1) Many counties in Michigan do not have a working Friend of the Court system that could undertake, even in theory, the additional responsibilities assigned it under revised 1101.

2) Few, if any, counties have the financial and administrative resources to manage and re-evaluate every case in which the family courts choose (under MCL 722.27 (7)(d)) to avail themselves of experts from the community. In actual practice, in counties where matters are sometimes referred to the Friend of the Court for investigation, either the case is referred immediately to an outside expert without further review by the Friend of the Court or the Friend of the Court issues a report that fails to result in the disposition of the case, *after* which the case is referred to an outside expert. Revised 1101 would require that every case sent to an outside expert be reviewed twice by the Friend of the Court.

3) Contemporary survey data show that both Michigan family court judges and Michigan matrimonial lawyers consider evaluations by outside experts to be more useful than Friend of the Court reports (Bow & Quinnell, 2001). This should not be surprising when one considers that, because of their limited resources per case, Friend of the Court workers can be expected to spend less time and use fewer independent or objective methods (e.g., psychological testing) than an outside expert. Yet the proposed change would subordinate the judgment of the outside expert to the Friend of the Court staff member.

More important still, the proposed rule changes would undermine due process by adding a superfluous layer of bureaucracy, promoting hearsay upon hearsay as admissible evidence on the pivotal issues in the case. Most disturbing, the proposed amendment would inevitably permit Friend of the Court opinions and recommendations to be offered without even an opportunity for access to, much less cross examination of, the underlying evidence:

1. The Friend of the Court, as a repository for the outside expert's findings, will routinely incorporate them, in whole or part, in its own report, and will thereby only add one more layer of hearsay to the fact-finding process.

2. Under the proposed changes, the ultimate responsibility for formulating expert opinions and conclusions as to critical issues in a family dispute would presumably fall to a Friend of the Court staff member rather than the expert whose investigation provided the foundation for the conclusions offered. Under the current rules, outside experts are subject to vigorous cross-examination, through which deficiencies in the foundation for the conclusions may be fairly probed. Ironically, in light of the objectives behind the proposed changes to MRE 703, no such critical exploration of the Friend of The Court's conclusions would be possible with the proposed changes to MRE 1101. Far from being a "reform," the practice of incorporating outside evaluators' reports in the Friend of the Court report would insulate experts from accountability on the witness stand for their opinions and seriously infringe on the due process rights of the parties to explore fully the bases for those opinions and to challenge them.

3. The current policy that excludes Friend of the Court reports from being entered into evidence is sound. Under the court rules (MCR 3.218), much of what the Friend of the Court considers in forming its opinions is classified as confidential and undiscoverable by the parties. If the Friend of the Court report is permitted to be entered into evidence, the full basis for the opinions expressed in that report need not be included. The parties will thus forfeit their opportunity to conduct adequate discovery prior to attempting to cross-examine a Friend of the Court staff member.

4. Rebuttal experts used to challenge the Friend of the Court or the underlying expert would be placed at a disadvantage by being held to a much stricter version of MRE 703 than their adversaries would face (i.e., they would be limited to facts in evidence, whereas their adversaries could rely on hearsay and would not even be required to reveal the full evidentiary basis for their opinions and recommendations). The unfairness and unworkability of this practice are plain.

5. Just as attorneys and judges are coming to terms with the Michigan Court of Appeals' clear signal in *Molloy vs. Molloy* (No. 224179, 2001) that the same due process rules and procedures apply in family court as elsewhere and that "secret evidence" is anathema in family court just as everywhere else, the proposed changes to MRE 1101 would push family courts in the opposite direction by having court personnel produce, manage, and protect from disclosure their own "evidence."

With regard to Mental Health Hearings for civil commitment, the proposed changes to MRE 1101 permit the use of hearsay only for the purposes of "testifying to a diagnosis." However, the history taking that inevitably involves considerable hearsay is not used primarily to establish a diagnosis, inasmuch as the threshold issues the mental health expert is being asked address include whether the person in question is dangerous to himself or others and whether he or she is able to understand the need for treatment. (Here once again, we respectfully request that the reader review our previous discussion of the MRE 1101 issues in our reply to Judge Giovan's objections, dated July 27, 2001.)

The Crux of the Matter

We have never shrunk from acknowledging the legitimacy of the concerns voiced by the Advisory Committee regarding the potential and actual abuse by attorneys of the MRE 703 as a "loophole" for inadmissible evidence and the failure of judges in many courtrooms to live up to their gatekeeping responsibilities. But we do not agree that this difficulty stems from any problematic language in MRE 703. The crux of the matter, in our opinion, is rather to be found in a tendency for judges and attorneys to take the responsibilities of courts under MRE 702 too lightly.

MRE 702 provides the rationale and foundation for all expert testimony, whereas MRE 703 simply clarifies when the expert may obtain information about the case and specifies one method the court may use in addressing discrepancies between the expert's account of the facts and the admitted evidence. Given that MRE 702 could easily stand alone without MRE 703, whereas the latter is unintelligible without the former, one might almost think of Rule 703 as being a sort of footnote to Rule 702.

Under MRE 702, the court's central responsibility with respect to experts is to determine whether the proffered testimony is likely to be helpful to the trier of fact in understanding the evidence or determining the facts. Michigan appellate court decisions in *Amorello v. Monsanto*, 186 Mich App 324 (1990), and *Nelson vs. American Sterilizer*, 223 Mich. App. 485 (1997) and a recent statute addressing the use of experts in personal injury litigation (MCL 600.2955) have established that such helpfulness is to be determined by the reliability and relevance of the evidence presented. If an expert's opinion is erected on a foundation that is grossly inconsistent with the admitted evidence, that opinion is clearly going to fail the test of relevance. Thus, judges are already mandated under MRE 702 to perform a significant gatekeeping function with regard to the foundations of expert's opinions before MRE 703 is even considered. To relieve judges under one rule of a gatekeeping responsibility they must continue to shoulder under its parent rule can hardly be good administrative policy or good jurisprudence

If judges are indeed routinely abdicating their responsibilities as gatekeepers, our system faces a grave problem that can hardly be remedied by some cosmetic surgery on the language of MRE 703. Such gatekeeping responsibilities go to the

very heart of what it means to be a judge. As both federal and state courts are in the process of clarifying and expanding the gatekeeping responsibilities of judges under MRE 702, a proposal to relieve them of what is essentially the same burden under MRE 703 smacks more of rearguard action than reform.

Conclusion

We remain convinced that the proposed changes in MRE 703 (in both alternative forms) and MRE 1101 create more serious problems than they purport to solve. By making the evidentiary process both more mechanistic and more cumbersome, they advance neither the interests of due process nor the efficient administration of justice. Neither is consistent with important new trends in both Michigan and federal law with regard to MRE 702. We believe that improved judicial education with regard to the use of experts and the rules of evidence and strict appellate review when judges abuse their discretion are the best ways to ensure the reliability and relevance of expert opinions.

Respectfully submitted,

Robert E. Erard, Ph.D.
Past President; Chair, MRE 703 Task Force
Michigan Psychological Association

Barbara McIntyre, Ph.D.
President,
Michigan Society of Forensic Psychologists

Daniel Swerdlow-Freed
President,
Michigan Psychological Association

Selections from prior correspondence attached

MPA
Michigan Psychological Association

July 27, 2001

Mr. Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Dear Mr. Davis:

On behalf of the Michigan Psychological Association and the Michigan Society of Forensic Psychologists, both 501(c)(6) corporations, incorporated under the laws of the State of Michigan, and attorney, Scott Bassett, Esq., we beg leave to supplement our prior testimony in reply to the February 23, 2001 "Memorandum from William J. Giovan to the Michigan Supreme Court Re: Public Responses to Proposed Amendments to the Michigan Rules of Evidence." In this memorandum, Judge Giovan critiques our joint testimony, offered at the public hearing on November 30, 2000, and proposes revisions to the Advisory Committee's recommendations with respect to the Proposed Amendment of Rule 703 of the Michigan Rules of Evidence, published at 463 Mich. (No. 3, 2000).

Rather than attempt to address point by point all of Judge Giovan's latest arguments and recommendations, we would simply ask the Court to permit us to amend our prior testimony with the following brief remarks and supportive evidence.

2105 University Park Drive, Suite C-1, Okemos, Michigan 48864, (517) 347-1885.*fax* (517) 347-1896

I. The majority of child custody cases do not require court-appointed psychological experts, but such experts are required in a substantial minority of cases

We do not quarrel with Judge Giovan that child custody evaluations should not be ordered when the court is convinced that no specialized knowledge beyond that ordinarily held by the finder of fact is required. In actual practice, however, custody evaluations are most likely to be ordered when there are unusual, complex, or intractable problems and the court wishes the consultation of an expert on divorcing families, child development, parental psychopathology, etc. About 16% of child custody cases are referred to outside mental health experts (Bow & Quinnell, 2001a).

II. The use of court-appointed experts is cost-effective and facilitates alternative dispute resolution

Family law attorneys do not advocate the appointment of child custody experts out of fear of legal malpractice. Rather they turn to them because they consider them cost-effective. They know that in the vast majority of cases, the psychological evaluation serves as a basis for alternate dispute resolution without a trial. Experienced experts report that, on the average, approximately 75% of the cases they evaluate–generally complex cases with high conflict–settle out of court; among individual experts, 90% is the modal (i.e., the most frequently reported) figure (Bow & Quinnell, 2001b, p. 266).

Contrary to Judge Giovan's assumptions in his recent memorandum, custody evaluations by highly experienced professionals cost an average of $3335.00 (with modal costs of $2500 and $4000) for 25-30 hours average professional time (Bow and Quinnell, 2001b, p. 263)—not $10,000 as Judge Giovan estimates. This cost is divided between the parties, either by agreement or by order of the court based on factors such as income. The parties are almost never required to submit to multiple evaluations. The cost of a custody evaluation represents a fraction of the cost of an evidentiary hearing before the court.

In Michigan, settlement discussions following psychological evaluations are routine, and the recommendations made in these reports commonly serve as the stimulus to a resolution of the case. In many cases, the evaluation and subsequent discussion of the evaluator's recommendations also has an important educational function for those parents who were previously unwilling or unable to place their children's interests above their own. These parents often learn a great deal about their children's needs and concerns. The evaluator's recommended custody/parenting time arrangement can also make the parents aware of creative solutions for resolving the conflict over the children. Even when the parties go forward from a custody evaluation to an evidentiary hearing, the prior gathering and organization of evidence in the custody evaluation dramatically reduces the length of trials and the number of witnesses who need to be called.

III. *"Battle of the experts" is rare in custody cases*

Judge Giovan's critical focus throughout his memorandum on the confusion and expense caused by each side hiring its own expert in child custody cases is an attack on a straw man. In most circuits in Michigan, in custody cases requiring family evaluations by a psychological expert, Family Division judges ask the parties to stipulate to a single impartial psychological expert or appoint one *sua sponte*. This is not just true in Michigan. National statistics indicate that 84% of child custody evaluations are court ordered (Bow & Quinnell, 2001b, p. 262). Frequently, the request for an evaluation comes from the parties themselves. Very rarely does each side appoint its own expert.

IV. *The right to bring a rebuttal expert to challenge a court-appointed expert must nevertheless be preserved*

Because the testimony of court-appointed experts can be highly influential in custody cases, it is vital to preserve the due process right of either party to call a suitable rebuttal expert. Such experts are called in a minority of those cases in which there is a court-appointed expert, but the possibility of using a rebuttal expert serves as a check on inadequate preparation or overreaching by the court-appointed expert. Ordinarily, the rebuttal expert does not

re-evaluate the family, but rather confines his or her testimony to advising the court about the conceptual weaknesses, technical inaccuracies, or factual deficiencies of the prior evaluation.

V. There are sound reasons for the increasing reliance of family courts on community resources

The increasing use of child custody experts over the past twenty years or so is associated with the advent of conscientious legislative and judicial efforts to base custody decisions on the best interests of children, a slippery and complex set of judgments requiring a great deal of knowledge about a family and its members. Now that courts no longer (properly) make presumptions in custody decision-making and parenting time based simply on the gender of the parent, the age of the children, or a simple-minded analysis of who was the "bad actor" in the marriage, both fathers and mothers have come to feel entitled to something more than a perfunctory analysis of their competing claims. As anticipated by the Michigan legislature, the requisite evaluations often require the use of community resources, including psychologists (see MCL 722.27 (7) (d)), in order to arrive at settlements more efficiently and to provide important information to the court in those occasional cases that go to trial. Pertinent information from psychological evaluations, based on psychological test results, individual and family histories, and professional clinical observations about parental attitudes and behaviors and children's emotional needs and preferences, among other data, is both reliable and relevant to the ultimate judgment to be made by the court.

VI. Psychologists' relevant expertise extends far beyond mental health diagnosis and treatment

Contrary to Judge Giovan's impression, psychologists are not merely experts in the treatment of mental illness. Their training and professional experience embrace myriad topics relevant to child custody, including research on the effects of divorce and different types of parenting time schedules on children; the issues that must be addressed when one parent decides to relocate to a new residence some geographic distance away; the developmental needs of

children with different ages, situations, and endowments; the impact of family violence and parental conflict on children; effective discipline and other healthy parenting practices; how children cope and fail to cope with changes in family structure (e.g., blended families); the impact of personality style on parenting capacities; and many more.

Judge Giovan is also concerned that experts increase the costs of custody cases by wasting too much time examining irrelevant issues. In fact, psychological experts do not generally spend a great deal of time on allegations and factors that are not particularly important in a given custody dispute (APA Committee on Professional Practice and Standards, 1994). Although court-appointed evaluators typically examine all of the best interest factors under the Michigan Child Custody Act (as the court ultimately must do) in formulating their recommendations, their evaluations generally rely on experience and impartial professional judgment to focus the issues on the most important and relevant problems in the case rather than treat all matters as equally important.

A recent survey, 279 psychologists with 23 years average clinical experience and 14 years child custody experience were asked to rate the Michigan statutory best interest factors in order of importance. All of the factors were rated important (at least 6 on a scale of 1-10), with the three most important being Factors A, J, and K. Factor G (the mental and physical health of the parties) was actually rated only fifth in importance (Bow and Quinnell, 2001b, p. 265).

Judge Giovan attempts to raise doubts about the validity as well as the relevance of custody evaluations. A thorough defense of the scientific underpinnings of custody evaluations is beyond the scope of this brief reply. For purposes of this discussion of the Rules of Evidence, we simply observe that while it is true that no recommendation about child custody can be arrived at with the scientific rigor, of, say, a ballistics analysis, the scientific foundations and methods (e.g., reliance on multiple, convergent sources of data and application of sound psychological principles) significantly increase the reliability and relevance of the findings of a custody evaluator over that of a more strictly intuitive or purely "common sense" approach.

VII. Child custody evaluations afford children a voice in the process

Custody evaluations do not add to the burdens of children going through a divorce and custody dispute. Rather they provide an opportunity for children's perceptions of their parents and concerns about their living situations to be evaluated by professionally trained experts who know how to minimize harm to the children from the process, while giving them a sense of being cared about and attended to.

VIII. The introduction of opinions by psychological experts into evidence through the Friend of the Court would violate due process protections and reduce efficiency at the same time

Expert psychological testimony could not effectively be smuggled in second-hand through the testimony of the Friend of the Court (under MCL 552.505 (d)), even if the law were changed such that the Friend of the Court's testimony were to be deemed admissible. Both the court and the Friend of the Court turn to community resources, as contemplated under the relevant statute (MCL 722.27 (7) (d)), precisely when they lack the internal resources or expertise to resolve or investigate a complex matter without such assistance. To the extent that the Friend of the Court is piggy-backing an opinion on that of an outside expert, to deprive either party of direct access to that expert for purposes of cross-examination would represent a failure of due process far more serious than the ostensible abuses of MRE 703 that the Advisory Committee seeks to avert.

Moreover, the Friend of the Court's investigation and opinions themselves will inevitably rely on substantial elements of hearsay and on facts not in evidence. There is no improvement here over the use of an independent expert. Indeed, because the Friend of the Court is likely, by dint of its limited resources per case, to spend less time and use fewer independent methods and instruments (e.g., psychological testing) than the outside impartial expert, the resulting testimony is likely to be less reliable.

A recent survey of 89 Michigan family law attorneys (average 15.9 years experience) found that court ordered evaluations by outside experts were considered significantly more useful by attorneys than Friend of the Court recommendations. Thirty-two Michigan family court judges (average 9.25 years on the bench) rated them even more highly as useful evidence than attorneys. On a scale of 1-5 (where 5=extremely helpful), the judges rated outside expert evaluations a mean value of 3.9 and attorneys, 3.73 (Bow & Quinnell, 2001a).

Finally, the proposal to allow psychological testimony to come into evidence back door through the Friend of the Court report betrays an ignorance about how the system actually operates. It is rare that a psychological evaluation precedes a report by the Friend of the Court caseworker or family counselor. Typically, the Friend of the Court report is the first of the interventions into the family, and often the least comprehensive. Many psychological evaluations are ordered only after the Friend of the Court's report is found wanting by one party or the court, or after it fails to result in a settlement of the dispute. It would incur substantial expense and would strain limited public resources to re-refer to the Friend of the Court all cases in which a psychological evaluation has taken place.

In effect, a staff member at the Friend of the Court, who has almost certainly spent much less time with the family than the evaluator, would be called up to restate or paraphrase the expert's conclusions. Both the court and the parties would thus be insulated by a superfluous layer of bureaucracy from access to the original evidence leading to the opinions and recommendations before them. That is not sound public policy or an effective use of the limited resources available to the Friend of the Court.

IX. The proposal to amend MRE 1101 to permit a mental health expert to rely on "hearsay historical information" in "testifying to a diagnosis in Mental Health Hearings" fails to address certain critical problems

In Mental Health hearings, addressing issues of civil commitment, mental health experts are required by statute to provide much more than a diagnosis. Under the Michigan Mental Health Code, civil commitments are not

predicated on diagnosis alone. In addition to offering a diagnosis, mental health professionals are routinely called on to testify as to whether the person in question "can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself or herself or another person" and whether this person "as a result of that mental illness is unable to attend to his or her basic needs" in order to avoid serious harm in the near future, and whether that person's "judgment is so impaired that he or she is unable to understand the need for treatment and whose continued behavior can reasonably be expected, on the basis of a competent clinical opinion, to result in significant harm to himself, herself or others." (MCL 330.1400-1401). Under the Mental Health Code, such "competent clinical opinion" must be offered by a physician, psychiatrist, or clinical psychologist. A relevant opinion cannot be predicated on diagnosis alone, and thus the "hearsay historical information" upon which such clinicians routinely rely must be used to address larger questions than merely diagnosis.

X. *The proposed revisions to MRE 703 raise intractable problems for psychological experts testifying in insanity trials and would be inconsistent with established Supreme Court precedent*

The proposed revisions to MRE 703 would have considerable adverse impact on experts testifying on the issue of insanity in criminal cases. Contrary to Judge Giovan's assertion, MCL 768.20a does not allow admission through expert testimony of the facts and data upon which the expert opinion is based. MCL 768.20a(6) requires that the expert submit a written report to the prosecutor and the defense attorney and that the report contain, first, an opinion "on the issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed" and, second, "the facts, in reasonable detail, upon which the findings were based." MCL 768.20a(8) provides that "the *report* may be admissible in evidence upon the stipulation of the prosecution and defense." Although admitting the written report into evidence does indeed allow the admission of some underlying facts and data without relying on MRE 703, such reports are frequently not admitted into evidence, especially in jury trials, because of the

range of information they summarize; and the reports cannot possibly contain every aspect of the facts upon which the expert opinions are based. Criminal courts therefore rely heavily upon the existing provisions of MRE 703 in allowing experts to testify about their opinions. Judge Giovan correctly notes that the Supreme Court, in *Dobben*, *Pickens*, and *Webb*, has either held or suggested that under MRE 703 a testifying expert may testify to hearsay foundation facts. His identification of MCL 768.20(a) as a "complicating factor" in these opinions seems an idiosyncratic reading of opinions which clearly rely upon MRE 703 rather than MCL 768.20(a) in delineating what experts can testify about.

XI. The problems in the proposed revisions to MRE 703 extend well beyond the confines of Family Courts, Probate Courts, and Criminal Courts

While we acknowledge that the problems posed by the proposed revision of MRE 703 are particularly egregious for Family, Probate, and Criminal Courts, we do not believe that the fundamental flaws in this revision can be patched over with any kind of special treatment or evidentiary gerrymandering for these courts alone. As we have been at pains to explain in our previous testimony, psychological and psychiatric experts and many other kinds of experts whose opinions are based on scientific and clinical investigations, conducted independently and within the canons and traditions of their own professions and specialties, cannot reasonably anticipate prior to trial precisely what facts and other opinions will ultimately come into evidence. Such investigative experts are routinely required during discovery and at trial in personal injury and employment matters as well as family law, probate, and criminal cases, and the reliability of their opinions depends on their being able to conduct their own factual investigations, following applicable professional and scientific principles.

XII. Expert opinion must be admitted into evidence on a case-by-case basis

It is simply not true that proponents of leaving MRE 703 as it is do not want judges to use discretion in admitting evidence. On the contrary, we maintain

that it is only a judge (and not the dead hand of a pre-ordained exclusionary rule) who can properly determine on a case-by-case basis when there is adequate factual foundation to support the admission of an expert's opinion.

XIII. *The evidentiary foundations of expert testimony can be shorn up with a less radical and surely less disruptive approach*

If the Supreme Court perceives a need to tighten up the foundations of expert testimony, we would recommend instead judicial education emphasizing the gate-keeping role of judges with regard to both reliability and relevance (and firm appellate support for judges who appropriately exercise such discretion). Further, as we have testified, we would have no objection to a revision of MRE 705, such that experts would be required to prepare a written report prior to trial stating their opinions and the evidentiary bases for them. This report could be furnished to all parties as a condition of their testimony. This rule would permit opposing counsel to file relevant motions *in limine* and the court to make its rulings on admissibility *before* the expert was called to the stand.

Respectfully submitted,

Robert E. Erard, Ph.D.
Past President

Mae Keller, Ph.D.
Past President

Scott Bassett, J.D.

Larry Friedberg, Ph.D.
President

Barbara McIntyre, Ph.D.
President

Mich. Psychological Assoc. Mich. Soc. of Forensic Psychologists Attorney

Referenced articles attached

MPA
Michigan Psychological Association

November 30, 2000

Comments on Proposed Changes to MRE 703

Thank you for the opportunity to comment on this important question. The Michigan Psychological Association, incorporated in 1935, the Michigan affiliate of the American Psychological Association, offers the following observations regarding what we consider certain unintended consequences of the proposed changes.

The Supreme Court Advisory Committee on the Rules of Evidence recommended in its August 2000 report a drastic revision of MRE 703, "Bases of Opinion Testimony by Experts." Currently the rule reads:

The facts or data in the particular case upon which the expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

The Advisory Committee intends to revise the rule to require that the facts or data in the particular case upon which the expert bases an opinion or inference "SHALL BE IN EVIDENCE." They do not intend, however, to restrict the discretion of the court to receive expert opinion testimony "SUBJECT TO THE CONDITION THAT THE FACTUAL BASES OF THE OPINION BE ADMITTED IN EVIDENCE THEREAFTER." In this fashion, they expressly intend an end to the practice of permitting the "presentation of data to the expert outside of court and other than by his own perception."

The prospect that juries may hear fact testimony or encounter documents through experts that would be otherwise inadmissible and that lawyers may abuse this "loophole" is real enough, but MRE 703 as currently written provides directly for a remedy within judicial discretion. The notion that we have to remove judicial discretion because it is believed that judges will not use the discretion they have both debases the judiciary and begs the question of whether judges might have valid reasons for challenging the foundations of expert's testimony as rarely as they do.

Experts are already subject to cross-examination on all bases for their opinions in both pre-trial discovery and at trial. They can be limited by judges who wish to prevent admission of underlying evidence of doubtful probative value and challenged by attorneys who introduce evidence casting doubt on the expert's version of the facts. If an attorney believes that an opposing expert will be offering opinions contrary to the established evidentiary record or otherwise predicated on an unreliable foundation, she should challenge the foundation for the testimony in accordance with MRE 702 and 703 through a motion *in limine,* motion to strike, or motion for an evidentiary hearing as to the inadequacy of the testimony. Determining the merits of such a motion in the specific context of the instant case is part of the gate-keeping responsibility of the court. Indeed, the trend in case law is to use the rules of evidence to *increase,* not dispense with, the sound exercise of judicial discretion in evaluating the foundations of expert testimony (cf. *Daubert vs. Merrell Dow Pharmaceuticals; Kumho Tire, Ltd. vs. Carmichael).*

More important, there is little doubt that the proposed rule will lead to certain disastrous consequences that the Advisory Committee probably did not intend. In some areas of litigation, where almost all data is gathered through a formal discovery process, consisting of interrogatories, depositions, medical records, business documents, and other public sources or sworn testimony, it may be possible to imagine requiring an expert to limit the basis of his or her testimony to facts in evidence. When, however, the expert's role is itself inherently investigative—i.e., where it is explicitly up to the expert to generate or discover a substantial portion of the relevant evidence himself rather than passively receive it through the discovery process conducted by the attorneys, such a revised rule would be totally unworkable.

Two conspicuous examples of experts serving as independent investigators are in the areas of court-appointed independent child custody evaluations and independent medical (or psychological) examinations. In these and similar situations, experts cannot possibly anticipate, much less control, which of their many sources of information may ultimately be admitted into evidence. Indeed, about the only thing they can be sure of is that much of the data that their professional and scientific standards and ethics would require them to consider in arriving at a professional judgment on the matter (much of it hearsay in its essence) *will not* be admissible under the other rules of evidence.

The Michigan Psychological Association's detailed objections to this rule change are as follows:

1. The investigative expert in a child custody matter or independent psychological evaluation can be expected to face conundrums such as the following:

    a. Will the parties examined in the expert's office testify in identical fashion before the court? (Note that their statements to the expert, not being sworn, and the expert's version of what they said being only hearsay and not even recorded by a court reporter, there is no reliable means of holding them to their earlier statements).

    b. Can the expert consider, in forming his opinions, the parties' biographical statements and personal histories (unless provided to the expert in the form of a genealogy or notation in a family Bible, as specified in MRE 803(13))?

    c. Will minor children (in child custody matters) be subjected to cross-examination at trial?

    d. Will a child's statements regarding sexual abuse by a parent to an evaluator be admissible in a child custody action (noting that MRE 803A concerns only criminal and delinquency proceedings)?

    e. Will collateral sources (in child custody matters--teachers, guidance counselors, principals, child therapists, marriage counselors, neighbors, babysitters, pediatricians; in IME's, neighbors, friends, physicians, therapists, relatives, co-workers, supervisors) all be brought to trial for their sworn testimony—and will they be willing to say as much in open court as to a mental health expert?

    f. Will all documents shown to the expert (prior custody evaluations, prior treatment records, witness statements, photographs, letters, notes, greeting cards, home movies, personal diaries and journals, calendars, audio recordings, financial records, telephone records, police reports, school projects, employment records, criminal records, substance abuse records, Child Protective Services reports) be properly authenticated and admitted into evidence at trial?

    g. Will experts who are surprised by the refusal of the court to admit certain data into evidence as they had anticipated be required to manage complicated hypotheticals about how their opinions would suddenly be different if they did not know what they do know?

2. Accordingly, psychological and psychiatric experts will effectively be limited to offering opinions based on:

    a. their own direct observations of the parties in their offices (excluding, for the most part, those parties' statements regarding their personal histories, the other parties, and most of the parties' other experiences outside the expert's office, except as these may come under some exception to the hearsay rules--e.g., admissions and excited utterances);

    b. psychological testing results (assuming that they withstand Frye or Daubert challenges as to their reliability and relevance to the legal matter at hand—a doubtful prospect, given that, according to professional and scientific standards, such results should not be considered in isolation from the life circumstances and biographical contexts in which the tests were given); and

    c. those documents or depositions that they are assured by counsel will be introduced into evidence or which, like certain medical or business records, are specifically permitted under the hearsay rules.

    "Expert" psychological opinions, based on such rag-tag sources, without the integrating features of a comprehensive psychological evaluation, are unlikely to meet either professional or legal standards.

3. Similar conundrums face any psychologist or psychiatrist serving as an independent psychiatric examiner pursuant to Section 20a of the Code of Criminal Procedure, M.C.L. 768.

    Writing for the majority in *People vs. Dobben,* 440 Mich. 679, 488 N.W.2d 726, Justice Boyle observed:

> An expert witness may...base his opinion on hearsay information or on the "findings and opinions of other experts"...Indeed, limitation of the basis of an opinion regarding criminal responsibility to firsthand information would require a medical expert to ignore, as best he can, data which from the scientific viewpoint is highly relevant and proper to take into account, namely the history of the case as related to the doctor by the patient and his relatives,

> and reports, charts, records and other data prepared by other medical men. In psychiatry, the patient's past medical and social history is of prime importance. A psychiatrist hesitates to make a diagnosis without the illumination afforded by what he calls a "longitudinal study of behavior." But often he learns the history of a patient's aberrant behavior only at second or third hand from friends or relatives, perhaps through a psychiatric social worker. Where the law forbids the psychiatrist to rest his diagnosis on such hearsay material, it requires him to base his diagnosis on what from the scientific viewpoint are incomplete data—or run the risk of having his entire testimony thrown out. Even where the psychiatrist has made a personal examination, if he admits on cross-examination that his diagnosis rests in part on such second or third hand reports, he may be chagrined to hear the judge order his testimony stricken based on hearsay.

4. While any discrepancy between an expert's factual assumptions and the evidence before the court can serve as a basis for impeachment on cross-examination, not all such discrepancies should lead to the exclusion of the expert's opinions or testimony. The proposed changes in MRE 703 ignore a critical distinction that is included in the present version of the rule, that between essential and inessential data underlying an expert's opinions. Under existing MRE 703, the court may require that "**underlying facts or data *essential* to an opinion or inference** be in evidence." We may operationalize this concept of *essential* underlying facts or data as follows. Each of those factual, theoretical, and procedural bases for an expert opinion, which, if successfully challenged, would render that opinion incredible, ought to be supported by facts in evidence. For example, if a child custody evaluator bases an opinion that a parent is unfit largely on a statement by a babysitter that that parent abused the child, and there is no opportunity to cross-examine that babysitter, the expert's opinion may be inadmissible. On the other hand, if, in forming an opinion, the expert relies on, but does not place considerable weight on, various other, inessential sources of information that help to provide coherence for the expert's understanding of the relevant issues, not all of this information must be in evidence. Thus, if an independent psychological evaluator investigating claimed mental injuries in an employment discrimination case considers information that some of the plaintiff's distress may have resulted from marital problems, but places little weight on this observation in forming his opinions, the absence of facts in evidence supporting the conclusion that the

plaintiff had marital problems may be used as a basis for impeachment but not for exclusion of the expert's testimony. An investigative expert is likely to gather information from many sources, only some of which are essential to her opinions and conclusions, but many of which provide the mortar between the bricks on which the opinion is constructed. The judge who is hearing the expert's testimony in the context of the totality of the admissible evidence is in the best position to distinguish between the essential and inessential features and thus, whether to allow the testimony.

5. The Advisory Committee's intention of reducing the time of preparation for trial, the length of trials, and the expense of trials by limiting the role of experts notwithstanding, the predictable consequences of their radical revision of Rule 703 will be quite the opposite. In all likelihood the proposed changes will:

    a. dramatically increase the number of cases that will fail to settle and instead go to trial, particularly in child custody matters and cases involving emotional distress or psychiatric disability as a principal element of damages, where psychological evaluations are often key elements in settlements and other forms of ADR.

    b. lengthen and complicate the course of formal discovery, especially in areas, like family law, where it is currently not so prominent.

    c. greatly lengthen the course of trials, given that matters which were formerly handled in summary fashion through experts' syntheses of a broad array of relevant data must now be introduced before the court piecemeal through a vast body of witnesses and authenticated documents.

    d. increase the number and complexity of challenges to the reliability of expert testimony under *Davis-Frye and Daubert/Kumho* criteria, due to the operation of the revised rule in preventing experts from relying on accepted professional standards and procedures in how they go about forming their opinions, thereby placing a greater and more confusing burden of discretion on the courts.

    e. glut the appellate docket with child custody, personal injury, and employment cases in which psychological experts have been used, based on arguable mismatches between the

ostensible bases of their opinions and the admitted evidence under the Revised 703.

Some might argue that the effective elimination of investigative experts is a price worth paying in order to protect finders of fact from potentially prejudicial and unreliable evidence that has not been passed through all of the rigors of the legal system. Those who believe this are not likely to be experienced in the area of family law, which is, for many citizens, their most probable point of contact with the legal system. It is fairly inconceivable that the number of family court judges would not require massive augmentation if these judges could not avail themselves of the assistance of investigative experts in high conflict cases. Even with such a large infusion of judges, it is highly probable that the far more frequent lengthy trials these highly complex, but often low-budget, cases require would lead to unconscionable delays for divorcing families. Further, many independent psychological examinations, which are frequently used in resolving and settling insurance claims, employment disputes, and personal injury damage claims, would lose all force and credibility, further burdening the courts and juries with the responsibility to make fundamentally psychological judgments during trials governed exclusively by the rules of evidence.

In conclusion, the proposed changes in MRE 703 attempt to remedy a sore thumb via an amputation. Voir dire, cross-examination, judges' instructions, and jurors' reliance on the totality of the evidence and their common sense already routinely prevent seduction by so-called experts offering unreliable or discrepant testimony (cf. Vidmar, D.J., 2000, Amicus curiae in *Kumho Tire. Law and Human Behavior, 24*(4)).

To the degree that MRE 703 is actually abused by attorneys who produce experts primarily for the purpose of introducing otherwise inadmissible evidence to juries, this practice is best addressed by alerting judges to this danger through continuing education and by strict appellate review of gross failures to employ reasonable judicial discretion. The rule as it stands is not defective and does not need reform.

Respectfully submitted,

Robert E. Erard, Ph.D.
Chair, MPA MRE 703 Task Force